UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 669

Case No. 595: KHAN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Mayer Gabay;

Whereas, on 29 July 1993, Shafiuddin Khan, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application in which he requested, in accordance with article 12 of the Statute of the Tribunal, the revision of Judgement No. 563, rendered by the Tribunal on 2 July 1992;

Whereas the application contained pleas which read, in part, as follows:

"III. PLEAS

The Applicant hereby applies to the Tribunal for a revision of Judgement No. 563, case No. 595: Khan due to the following factors:

1. The discovery of a very important correspondence of confidential nature between [the UNICEF Representative, Addis Ababa] and Director, DOP [Division of Personnel], New York dated 7 November 1989 not copied to the Applicant ... [which] if brought to the attention of the Tribunal could have played a decisive role when the judgement was given. (Judgement No. 563)

2. The Tribunal's observation in its Judgement No. 563, case No. 595: Khan that 'there is no suggestion, in the view of the Tribunal, that the Applicant was dissatisfied with the procedure followed' clearly signifies that the Tribunal was ignorant of the fact that the Applicant has expressed his dissatisfaction ...

3. ... The Tribunal has not delivered justice to a poor worker of the United Nations with outstanding performance on record for more than 26 years of continued service and relied only upon the Respondent's version ...

..."

Whereas the Respondent filed his answer on 21 January 1994;

Whereas the Applicant filed written observations on 28 April 1994;

Whereas, on 14 July 1994, the Respondent filed an additional statement and on 14 September 1994, the Applicant provided his comments thereon;

Whereas, on 2 October 1994, the Applicant submitted an additional statement and filed further documents;

Whereas, on 26 October 1994, the Applicant submitted an additional statement;

Whereas the facts in the case have been set forth in Judgement No. 563.

Whereas the Applicant's principal contentions are:

1. The Tribunal and the Applicant were unaware at the time the Tribunal rendered Judgement No. 563 of a memorandum dated 7 November 1989, from the UNICEF Representative in Addis Ababa, transmitting the results of an investigation of the Applicant to the Dircctor, Division of Personnel at Headquarters.

2. The Respondent did not follow the procedures set forth in administrative instruction CF/AI/1990-05 on "Revised Disciplinary Measures and Procedures".

3. The Director of Personnel had no legal authority to refer the Applicant's case to the Joint Disciplinary Committee without the explicit recommendation of the Head of the Office.

4. The Tribunal mistakenly indicated that "there is no suggestion in the view of the Tribunal, that the Applicant was dissatisfied with the procedure followed."

Whereas the Respondent's principal contentions are:

1. An application for revision of a final judgement must be based on the conditions set out in article 12 of the Statute of the Tribunal and not on the Applicant's views on the merits of his or her claims.

2. There is no basis for the revision of Judgement No. 563, pursuant to article 12 of the Statute of the Tribunal.

The Tribunal, having deliberated from 19 October to 4 November 1994, now pronounces the following judgement:

I. The Applicant seeks revision of Judgement No. 563 and oral proceedings. The Tribunal considers that the file before it is adequate and finds no need for oral proceedings. The Applicant's main ground for revision is that he was not given a copy of the memorandum sent by the UNICEF Representative, transmitting to Headquarters the Applicant's answer to the charges levelled against him. The text of the memorandum reads, in part, as follows:

> "...
>
> I think that he answered in a very detailed way to all questions; it will be up to DOP [Division of Personnel] to check all the technical matter on which I am not an expert.
>
> ... I did delegate [the Applicant] to sign short-term and fixed-term contracts, considering that, for short term, UNICEF Addis Ababa created internal rules and for fixed-term contracts, after the suggestion of SAP [Selection Advisory Panel] and APC [Appointment and Placement Committee], with

> the endorsement of the Representative, the signature of the contract becomes a pure formality.
>
> The renewal of a GS [General Service] fixed-term contract also remains a formality if the supervisor writes a letter stating that the staff member's performance is, without doubts, 'good'.
>
> For National Officers' contracts, all matters, including the 'formalities' of the contract, remain, of course, in the hands of the Representative.
>
> Your early comments on [the Applicant's] answers will be very much appreciated."

The Applicant also claims that the UNICEF Representative should have acted in accordance with paragraph 6 of CF/AI/1990-05 which reads as follows:

> "6. The Head of Office shall communicate the results of the investigation and recommend to the Director of DOP [Division of Personnel], Headquarters within five working days from the date the staff member's response was due whether:
>
> (a) To withdraw the charges and close the matter;
> (b) To summarily dismiss the staff member for serious misconduct;
> (c) To refer the case to a JDC [joint disciplinary committee] for advice."

II. The Applicant alleges that the memorandum omitted the recommendations required by paragraph 6 of CF/AI/1990-05 while it included considerations apparently justifying some aspects of the Applicant's conduct.

The Applicant also submits that a phrase included in paragraph VIII of Judgement No. 563 shows that the Tribunal "was ignorant of the fact that the Applicant ... expressed his dissatisfaction with the procedures followed."

III. The Tribunal recalls that, according to article 12 of its Statute, a judgement is subject to revision only in the case of "the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the

Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence."

It is to be noted that article 12 requires, in the first place, that the new fact be of a decisive nature and also that it should have been unknown, both to the Tribunal and to the party claiming revision, at the time of the judgement.

IV. The Applicant claims that the memorandum of 7 November 1989 was unknown to him and that, therefore, its discovery constitutes a new fact. The Tribunal has to decide whether this new fact meets the requirements of article 12 of its Statute.

V. In the view of the Tribunal, the non-transmittal of the memorandum of 7 November 1989 to the Applicant cannot be considered "a decisive factor", as required by article 12. The Tribunal need not enter into the question of whether a copy of the memorandum should have been made available to the Applicant. Even if there was an obligation to do so, the omission to communicate the document would only constitute a minor procedural flaw, having no bearing on the outcome of the case. The Applicant's defence was not impaired by the Applicant's ignorance of the memorandum. The circumstances mentioned in the memorandum as possibly attenuating some of the charges, i.e. the admission by the Resident Representative that he had delegated "[the Applicant] to sign short-term and fixed-term contracts" were before the Joint Disciplinary Committee and were consequently before the Tribunal when it rendered Judgement No. 563. It is thus perfectly clear, in the Tribunal's view, that article 12 cannot be invoked in this instance.

VI. As to the Applicant's allegation that the UNICEF Representative did not adhere to CF/AI/1990-05, the Tribunal also concludes that it does not constitute a new fact of a decisive nature warranting revision. As to the Applicant's contention that he was not duly informed of the possibilities opened to him by article 11 of the Tribunal's Statute, the Tribunal finds that the

Applicant was so informed in a letter dated 31 July 1992, from the Executive Secretary of the Tribunal.

VII. As regards the alleged implication of the phrase used by the Tribunal at the end of paragraph VI of Judgement No. 563, the Tribunal notes that it cannot be claimed, as the Applicant does, that the Tribunal was ignorant of the issues submitted to it. The text of Judgement No. 563 clearly shows that all the points raised by the Applicant were duly disposed of.

VIII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Mayer GABAY
Member

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary